Supreme Court, U.S.
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NO. 90-1638
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

HELEN LAND PETITIONER

VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 2, 1991

NO. 90-1638
IN THE
SUPREME COURT OF THE UNITED STATES
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HELEN LAND PETITIONER

VS. NOTARIZED STATEMENT

COMMONWEALTH OF KENTUCKY RESPONDENT

The affiant, after being duly sworn, states the following facts:

1) On May 2, 1991, the affiant mailed, postage prepaid, forty copies of the Brief for Respondent in Opposition to Petition for Writ of Certiorari, properly addressed to the Honorable William K. Suter, Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.

2) On that same day the affiant also served counsel for petitioner with 2 copies of the Brief in Opposition.

3) On May 6, 1991, the affiant was contacted by the U. S. Supreme Court Clerk's Office and directed to refile the Brief in Opposition in booklet form. The affiant has complied with this request on this date and served two copies on opposing counsel.

Further the affiant sayeth not.

Carol C. Ullerich

CAROL C. ULLERICH
ASSISTANT ATTORNEY GENERAL
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COUNSEL FOR RESPONDENT

Subscribed and sworn to before me by Carol C. Ullerich on this the 8th day of May, 1991.

Susan Foster

NOTARY PUBLIC, STATE AT LARGE

My commission expires: 10-6-94

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether blood, properly drawn by a qualified hospital technician for diagnostic purposes and used by police for routine accident investigation, is admissible to establish the blood alcohol concentration of an individual subsequently charged with drunk driving?

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OPINION BELOW

The Opinion below is correctly set forth in petitioner's appendix. The decision is unpublished.

JURISDICTION

The jurisdictional facts are correctly set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are correctly set forth in the petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions are set forth correctly in the petition.

COUNTERSTATEMENT OF THE CASE

Two pickup trucks collided on a Fayette County, Kentucky road. One vehicle was driven by Raymond Harris. The other was driven by petitioner. Craig Moberly, a passenger in the Harris truck, died from upper chest and head injuries caused by the left front tire of petitioner's truck as it penetrated Harris' windshield. In addition to petitioner and Harris, two other passengers sustained numerous injuries.

Petitioner was transported to St. Joseph Hospital in Lexington. While in the Emergency Room, Officer Horace Embree attempted to get authorization from her to draw a blood sample.

Petitioner was incapacitated, but not comatose. She did not consent to the blood sample which Deborah Turner collected for the hospital's diagnostic purposes. Turner testified she stuck petitioner once but drew blood for both the hospital lab and the police. Turner also said she would have drawn the blood even if Embree had not requested it.

When Embree was dispatched to collect blood samples from petitioner and her passenger, Virginia Madelung, police were uncertain which woman was driving petitioner's truck. Police requested the blood as part of their routine accident investigation. Petitioner had not been placed under arrest. Criminal charges were not anticipated until later when petitioner told Officer Eric Bostrum she was

driving the truck and had imbibed two drinks. This conversation occurred at 5:30 a.m. on July 30, 1988. The collision is believed to have happened at 10:05 p.m. on July 29, 1988.

Petitioner objected to introduction of her tape recorded statement to Bostrum. In fact, a pretrial suppression hearing was convened in which petitioner testified that she had no memory of the crash. She recalled an officer with a recorder visiting her but did not remember her conversation with him. The tape proves petitioner was alert and responsive when she spoke with Bostrum. She corrected the officer when he mentioned an old address for her and she related several details about the previous night including the fact that she was driving

Madelung to her home on West Second Street. Once petitioner admitted driving the truck, she was advised of her Constitutional rights. She was specifically told she could stop talking at any time and that repercussions could result from the officer's questions. Petitioner continued talking and admitted she had been drinking at the Village Pub.

Chemist Terry Comstock testified petitioner's blood alcohol concentration measured .13%. A 750 ml. whiskey bottle was found in petitioner's cab.

A Kentucky jury found petitioner guilty of second-degree manslaughter, fourth-degree assault (three counts) and driving under the influence. The trial court accepted the

jury's verdict and sentenced petitioner in accordance with the jury's recommendations. Petitioner is serving a maximum sentence of ten (10) years.

This collision, which resulted in death and severe injuries to four people, occurred on July 29, 1988. On February 16, 1989, petitioner was again charged with driving under the influence; this time she was in Georgetown, Kentucky.

In an unpublished opinion, the Kentucky Court of Appeals unanimously affirmed the conviction. One of three issues argued by petitioner was whether the blood sample drawn for police by the medical technician from the same needle puncture used to draw a sample for the hospital constituted an unreasonable search and seizure. The appellate court

found a critical factor in determining whether constitutional violation occurred to be the purpose for drawing the blood. The court concluded the blood was properly drawn by a qualified hospital technician for diagnostic purposes and was also used by police for routine accident investigation. Thus, no constitutional violation occurred. A petition for rehearing was denied by the Kentucky Court of Appeals. Discretionary review of the opinion was denied by the Kentucky Supreme Court. This petition for certiorari followed. Additional relevant facts will be developed during the following argument.

ARGUMENT

PETITIONER'S BLOOD WAS PROPERLY DRAWN FOR DIAGNOSTIC PURPOSES AND ROUTINE ACCIDENT INVESTIGATION; THE TEST RESULTS WERE PROPERLY ADMITTED AT TRIAL.

Contrary to petitioner's claim, the Kentucky trial court correctly

admitted the results of petitioner's blood alcohol test under Marks v. Commonwealth, Ky.App., 698 S.W.2d 533 (1985). Marks was convicted of second-degree manslaughter. Following an accident, hospital personnel performed a routine blood test on Marks as part of their normal diagnostic procedures. When the blood was drawn from Marks, no police officers were present, it was not taken at their request, no arrest had been made, nor did probable cause exist to make an arrest. Id., at 318. Since the blood was drawn for routine diagnostic purposes, the Kentucky Court of Appeals found no error in admitting analysis of the blood at trial.

Marks is much like the case at bar. Following the crash, petitioner

was transported to the hospital. Officer Bostrum directed Officer Embree, via radio, to collect blood samples from petitioner and Virginia Madelung. This directive was issued before the suspicion of intoxication was formed. Taking a blood sample from those injured in the wreck was a standard procedure due to the seriousness and complexity of the collision. No charging decision had been made when petitioner's blood was drawn. Neither petitioner nor Madelung had been charged with driving under the influence when Deborah Turner collected the blood sample.

Turner testified she would have drawn blood for the hospital's own diagnostic purposes even if Officer Embree had not requested it. Turner stuck petitioner only once but drew

sufficient blood for the hospital and for the police. Officer Embree followed Turner to the witness stand. He testified blood was drawn from petitioner at approximately 12:30 a.m. on July 30, 1988. He described petitioner as incapacitated but not comatose. She would not respond to his questions and was unable to authorize the blood sample. Over a defense objection, chemist Terry Comstock testified petitioner's blood alcohol concentration was .13%. Since Turner testified she drew the blood for routine diagnostic purposes, Marks controls the issue and there was no error. Further, it must be stressed the blood was not drawn specifically for use at trial because no charging decision had been made at the time the blood was drawn.

The drawing of the blood was not an unreasonable search and seizure violative of the United States Constitution.

Kuzmiak v. Flowers, Ky., 580 S.W.2d 226 (1979) provides further support for admitting the blood analysis. In Kuzmiak, a wrongful death action, the Kentucky Supreme Court approved the taking of a blood sample from a decedent in a vehicular accident. Finding blood alcohol tests to be essential to highway accident investigation, it was held that "taking a blood sample from the body of any person killed in an automobile accident falls within the legitimate scope of an investigating law enforcement officer's inquiry to seek out the cause of death." Id., at 227. The luck and

fortuity of surviving a crash does not diminish the value of blood samples from those who do not die as a result of an accident. Thus, under both Kuzmiak and Marks, petitioner's blood was properly drawn for hospital diagnostic purposes and routine accident investigation. The test results were correctly introduced at trial. See also Woosley v. Central Uniform Rental, Ky., 463 S.W.2d 345, 349 (1971) indicating the drawing of blood for routine accident investigation is permissible. Petitioner's cited case of Washburn v. Commonwealth, Ky., 433 S.W.2d 859 (1963) is inapposite. Washburn was rendered prior to enactment of KRS 186.565. The opinion acknowledges considerations may be entirely different after adoption of that statute. Id., at 861.

Petitioner's Fifth Amendment claim is resolved adversely to her by Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The withdrawal of blood does not compel an individual to provide communicative or testimonial proof. 384 U.S. at 761, 16 L.Ed.2d at 914.

Because Schmerber was already under arrest when his blood was drawn, that decision does not answer petitioner's Fourth Amendment claim. Nevertheless, the Constitution "does not guarantee freedom from all arrests or seizures, only unreasonable ones." Cook v. Commonwealth, Ky., 649 S.W.2d 198 (1983). In Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957), the defendant's pickup collided with a car killing its three occupants

and seriously injuring defendant. A nearly empty pint whiskey bottle was found in the glove compartment of the pickup. 352 U.S. 433, 1 L.Ed.2d at 449. Unconscious, Breithaupt was taken to a hospital emergency room where a police officer smelled liquor on the defendant's breath. The officer requested a blood sample and the attending physician obliged the request. After the blood had been tested, Breithaupt was charged with manslaughter. This Court concluded:

> . . . there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the

> taking a violation of a constitutional right; and certainly the test as (sic) administered here would not be considered offensive by even the most delicate.
>
> . . .
>
> We therefore conclude that a blood test taken by a skilled technician is not such 'conduct that shocks the conscience;' nor such a method of obtaining evidence that it offends a 'sense of justice.' (Citations omitted).

Id., 352 U.S. 435-437, 1 L.Ed.2d at 451-452. It is unclear if Breithaupt was formally arrested prior to the drawing of his blood. However, it is clear he was not charged until his blood had been tested. The formality of arresting an unconscious person is not a magical incantation that will suddenly stir the individual into refusing consent. The act of placing an

individual under arrest should not be so pivotal as to impede accident investigation under Kuzmiak. Recognizing the danger alcohol represents, this Court in Breithaupt went on to say:

> As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of

> deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions.

Id., at 453. Petitioner's blood was properly drawn by a qualified technician for diagnostic purposes and sought by police for routine accident investigation. The lack of a formal arrest did not transform this routine procedure into an unreasonable search and seizure. The blood test results were correctly introduced at trial. Petitioner's conviction was correctly affirmed by the Kentucky Court of Appeals. All issues were fully and

correctly decided below. The cases cited by petitioner are distinguishable on their facts. This Court should deny the petition for a writ of certiorari.

CONCLUSION

The drawing of blood for diagnostic purposes and routine accident investigation did not constitute an unreasonable search and seizure. The petition for a writ of certiorari should be swiftly denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, Carol C. Ullerich, a member of the bar of the United States Supreme Court, hereby certify that two copies of the Brief for Respondent in Opposition to Petition for Writ of Certiorari have been mailed, first class postage prepaid, to Hon. Bobby G. Wombles, 201 W. Vine St., Lexington, Ky. 40507, Counsel for Petitioner, this 2nd day of May, 1991.

I further certify that 40 copies of the Brief for Respondent in Opposition to Petition for Writ of Certiorari have been mailed, first class postage prepaid, to Hon. William K. Suter, Clerk, United States Supreme Court, One First Street, N. E., Washington, D.C. 20543 for filing this 2nd day of May, 1991.

Carol C. Ullerich

Carol C. Ullerich
Assistant Attorney General

Counsel for Respondent